Petition

81-1249

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In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD L. EIDE, ET UX., PETITIONERS

v.

JULIE LELATH SEGUIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
KATHERINE S. GRUENHECK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

This is a constitutional tort action for damages against the District Director of Customs in his personal capacity. The court of appeals held that petitioner violated the Due Process Clause of the Fifth Amendment solely because of the passage of 4½ months between the seizure of respondent's automobile for forfeiture and petitioner's referral of the case to the United States Attorney for the commencement of forfeiture proceedings. The questions presented are:

1. Whether the Due Process Clause was violated as a result of the 4½-month delay, where respondent had filed a petition with the Customs Service for administrative relief from forfeiture and related criminal proceedings were pending during most of the period in question.

2. Whether the delay in this case violated the Due Process Clause in view of the availability of post-seizure process by which respondent could have contested the lawfulness of petitioner's continued possession of her automobile.

3. Whether petitioner was entitled to a qualified good faith immunity defense as a matter of law, in view of the absence of judicial precedent reflecting a "clearly established" obligation to refer a case for forfeiture within a period of time shorter than 4½ months, when a petition for administrative relief and related criminal proceedings are pending.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of District Director of Customs Donald L. Eide and his wife,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 645 F.2d 804. The October 24, 1978 judgment order of the district court (App. D, *infra*, 18a), entered upon a jury verdict of the same date (App. C, *infra*, 17a), is not reported. The

[1] Petitioner Eide's wife was sued solely in that capacity. Because Mrs. Eide was not alleged personally to have engaged in any wrongdoing, this petition refers only to Mr. Eide as the petitioner.

January 17, 1979 opinion of the district court, denying petitioner's motion for judgment notwithstanding the verdict or for a new trial (App. E, *infra*, 19a-25a), also is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1981, and a petition for rehearing was denied on August 28, 1981 (App. B, *infra*, 16a). On November 18, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. 19 U.S.C. 1595a(a) provides:

> Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.

3. 19 U.S.C. 1603, prior to its amendment in 1978, provided:

> Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

4. 19 U.S.C. 1605 provides in pertinent part:

> All vessels, vehicles, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law * * *.

5. 19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, * * * files a petition for remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence

> or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

6. 19 C.F.R. 171.2 (1975) provided in pertinent part:

> (a) *Case referred for institution of legal proceedings.* No action shall be taken on any petition if the civil liability has been referred to the United States attorney for institution of legal proceedings. The petition shall be forwarded to the United States attorney.

STATEMENT

1. Under 19 U.S.C. 1595a(a), "every * * * vehicle * * * used in * * * [the] subsequent transportation of any article which * * * has been introduced * * * into the United States contrary to law * * * shall be seized and forfeited * * * ." Once property is seized, the responsible Customs agent has a statutory obligation to report the seizure "immediately" to "the appropriate customs officer for the district in which such violation occurred" (19 U.S.C. 1602).

The Secretary of the Treasury may remit or mitigate a forfeiture, upon the claimant's petition, if he finds that it was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law" or if he finds other mitigating circumstances (19 U.S.C. 1618). If no petition is filed, or if, after

consideration and decision on a petition it appears that legal proceedings in connection with the seizure are necessary, the appropriate Customs Officer, after appraising the merchandise (19 U.S.C. 1606; 19 C.F.R. 162.43), must prepare a full report of the seizure for the United States Attorney, giving all the relevant facts and circumstances (19 U.S.C. 1603; 19 C.F.R. 162.43). At the time of the seizure in this case, there was no requirement in the statute regarding how quickly the Customs Officer should prepare and transmit his report to the United States Attorney. Congress subsequently amended the statute to require the Customs Officer to act "promptly." Customs Procedural Reform and Simplication Act of 1978, Pub. L. No. 95-410, Section 110(b), 92 Stat. 896, 19 U.S.C. (Supp. III) 1603.

Upon receipt of a report, the United States Attorney is required "immediately to inquire into the facts" and, if it appears probable that a forfeiture has been incurred, "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay" (19 U.S.C. 1604). After a case is reported to the United States Attorney, no administrative action may be taken by the Customs Service on a petition for remission or mitigation. 19 C.F.R. 171.2(a).

The instant case is a *Bivens*-type damages action [2] brought by respondent against the District Director of Customs in his personal capacity for the injuries resulting from the loss of the use of her automobile during a period of 4½ months between the seizure of the automobile and the referral of the case to the United States Attorney.

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[2] See *Bivens* v. *Six Unknown Named Agents, Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. On February 5, 1975, respondent accompanied David Benson to the Seattle-Tacoma International Airport in Benson's automobile. At the airport, Benson, who identified himself as Michael Morrison, presented an air waybill to a Customs Inspector and sought to pick up two packages from South Africa. The Customs Inspector became suspicious and told Benson that he would not release the packages until he had them appraised. Benson gave the inspector respondent's telephone number to call when the appraisal was completed. When Benson and respondent left, the inspector opened the packages and found 44 South African gold Krugerrands secreted in the frames of two plaques (App. A, *infra*, 2a-3a).

Customs Special Agent Raymond Hightower determined that Krugerrands were merchandise subject to declaration. In consultation with the United States Attorney's Office, Agent Hightower arranged for a controlled delivery of the packages. On February 7, 1975, a freight agent called Benson at respondent's telephone number to notify him that the packages could be cleared (App. A, *infra*, 3a). On that same day, respondent drove Benson to the airport in her automobile, a 1974 Dodge Dart. After Benson picked up the plaques, she drove him to a house in Seattle. A warrant for the search of the house then was obtained from a United States Magistrate. The search warrant was executed, the Krugerrands were seized, and Benson and his wife were arrested and subsequently indicted for smuggling Krugerrands into the United States in violation of 18 U.S.C. 545 (App. A, *infra*, 3a).[3]

[3] Benson also was charged with entering merchandise into the United States under a false declaration, in violation of 18 U.S.C. 542 (App. A, *infra*, 3a).

On February 13, 1975, Agent Hightower seized respondent's automobile for forfeiture pursuant to 19 U.S.C. 1595a because of its use in the transportation of the allegedly smuggled gold pieces (App. A, infra, 3a; R. 10; Tr. 217-275).[4] On the following day, Hightower turned the car over to a representative of petitioner, the District Director of Customs (App. A, *infra*, 3a).

On February 25, 1975, respondent wrote a letter to petitioner, stating that she had been unaware of the contents of the package and petitioning for the return of her automobile (R. 61-62). On March 19, 1975, petitioner informed respondent by letter that her application for relief from forfeiture was under consideration (App. A, *infra*, 4a; R. 62). On April 2, 1975, respondent's attorney wrote a letter to petitioner calling petitioner's attention to what the attorney described as "new developments" which, in his view, indicated that the Bensons and respondent did not have knowledge of the contents of the package and requesting that petitioner exercise his discretion to return the automobile (R. 63-64). By letter dated April 16, 1975, petitioner informed respondent's attorney that the case was currently under investigation and that he would be notified of the decision regarding the disposition of the automobile at the conclusion of the investigation (R.65).

On May 15, 1975, the district court dismissed the smuggling count of the indictment against Benson and his wife, concluding that Krugerrands are currency, not merchandise subject to declaration under

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[4] "R." refers to the record in the court of appeals. "Tr." refers to the trial transcript.

18 U.S.C. 545 (App. A, *infra*, 4a).[5] On June 10, 1975, the Department of Justice determined not to appeal the dismissal of the smuggling count against the Bensons. *Ibid.*

The dismissal of the criminal case did not, however, dispose of the forfeiture action. The Regional Counsel of the Customs Service previously had requested a formal Treasury Department ruling on the question whether Krugerrands should be regarded as currency not subject to declaration, in view of the fact that they did not circulate freely in South Africa (Tr. 430-431) That ruling, which concluded that Krugerrands are not currency and therefore *are* subject to declaration, was issued by letter to the Regional Counsel dated May 16, 1975 (R. 37-38; Tr. 432). After several conversations between petitioner's staff and the Regional Counsel's staff, a decision was made to proceed with the forfeiture case by referring it to the United States Attorney's Office (Tr. 345-346). The case was referred to that office on July 3, 1975 (App. A, *infra*, 4a), but on July 25, the United States Attorney declined to institute forfeiture proceedings (Tr. 418). The car then was released to respondent on August 6, 1975 (App. A, *infra*, 4a).

2.a. On February 11, 1976, respondent brought the instant suit for damages against petitioner in state court (R. 5-9).[6] The case was removed to the

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[5] Because the trial was scheduled for May 19, 1975, and because the Assistant United States Attorney was of the view that the false declaration count against Benson did not present a triable case standing alone, the government voluntarily dismissed the false declaration count against Benson on May 16 (App. A, *infra*, 4a; Tr. 390-391).

[6] Respondent also named Agent Hightower as a defendant, contending that his seizure of the car without a warrant

United States District Court for the Western District of Washington (App. A, *infra*, 4a). On several occasions prior to and during trial, petitioner moved to dismiss the complaint or for summary judgment, contending that respondent had failed to allege or prove a constitutional violation and that petitioner was, in any event, entitled to a qualified good faith immunity as a matter of law. On each occasion, the motion was denied. See R. 26-35, 70-71, 78-87, 130; Tr. 202-205.

At trial, petitioner introduced uncontradicted testimony showing that at the time the forfeiture matter was before him, it was Customs Service policy to postpone referring forfeitures to the United States Attorney until an investigation of a petition for administrative relief from forfeiture was made; that generally a referral also would be postponed pending the outcome of related criminal proceedings; and that at the time of the conduct in this case, five months would not have been considered an unreasonable or unusual period within which to refer a forfeiture in a case where a petition for relief had been filed (Tr. 335-337, 437-441). In addition, petitioner testified that in 1975, there were 1,400 active cases in his office and 1,223 vehicles were seized within his office's jurisdiction (Tr. 329-330).

b. Petitioner renewed his motions to dismiss and for summary judgment at the close of all the evidence. The district court concluded that Agent Hightower had "all the probable cause in the world" to seize respondent's car (Tr. 469), but it nevertheless

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violated the Fourth Amendment (R. 6). The jury returned a verdict in favor of Hightower (R. 336), and respondent did not appeal the adverse judgment. See also *Benson* v. *Hightower*, 633 F.2d 869 (9th Cir. 1980), cert. denied, No. 80-1811 (Oct. 5, 1981).

denied petitioner's motions. The court reasoned that although 19 U.S.C. 1603 did not then expressly require a prompt referral to the United States Attorney, several judicial decisions had imposed such a requirement and that the jury therefore should be permitted to determine whether petitioner had made a "prompt" referral (Tr. 469-470).

c. The jury returned a verdict in favor of respondent in the amount of $7,300 (App. C, *infra*, 17a). On January 17, 1979, the district court denied petitioner's motion for judgment notwithstanding the verdict or for a new trial, rejecting petitioner's contentions that the passage of 4½ months between seizure and referral was, as a matter of law, not unreasonable; that petitioner was entitled to qualified immunity as a matter of law on the ground that his actions were reasonable under the law at the time of the actions complained of; that petitioner was entitled to absolute immunity for exercising his unreviewable discretion to refer property to the United States Attorney for forfeiture proceedings; and that the damage award was excessive and contrary to law (App. E, *infra*, 19a-25a; see R. 366-385).

3.a. The court of appeals affirmed the finding of liability (App. A, *infra*, 1a-13a). First, the court acknowledged that the requirement that the District Director "promptly" refer a matter to the United States Attorney was not added to 19 U.S.C 1603 until 1978, three years after the seizure of respondent's car. But the court concluded that this nevertheless was the appropriate due process standard by which to judge petitioner's conduct (App. A, *infra*, 6a). The court observed (*ibid.*) that in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), this Court had held that the government would have to institute proceedings for the forfeiture of the materials there at issue within a

period of 14 days. Although the court of appeals recognized that "[t]here are certainly differences between a case presenting an issue of prior restraint under the first amendment, such as *Thirty-Seven Photographs*, and a case such as this one which presents a question of due process" (App. A, *infra*, 6a), the court reasoned that the "implication" of *Thirty-Seven Photographs* was that "lengthy and unexplained delays will not be tolerated" (*ibid.*). With respect to the particular facts of this case, the court rejected the contention that the period of 4½ months prior to referral was not excessive as a matter of law, noting that some courts that had sustained longer periods of delay had specifically accepted the position, which was not accepted by the Ninth Circuit in *Ivers* v. *United States*, 581 F.2d 1362, 1372 (1978), that the filing of a petition for administrative relief can toll the period between seizure and referral (App. A, *infra*, 7a-8a).

Second, the court of appeals concluded that petitioner was not entitled to the defense of qualified immunity as a matter of law. The court acknowledged (App. A, *infra*, 10a) that, under this Court's decisions discussing the immunity defense, an Executive branch official cannot be held liable unless the constitutional rule he is alleged to have violated was "clearly established" at the time of his action. The court also acknowledged (App. A, *infra*, 8a-10a) that its decision in *Ivers* v. *United States*, *supra*, which rejected the tolling argument, was not announced until three years after petitioner's challenged conduct in this case and that the court had observed in *Ivers* that this issue had " 'provoked a bold conflict of rulings among the district courts' " (App. A, *infra*, 10a, quoting 581 F.2d at 1370). But the court did not find these factors to be sufficient,

because at the time of petitioner's conduct in the Western District of Washington, the only district court decisions in the Ninth Circuit on the tolling issue—both in the Central District of California—had rejected the tolling argument, while the district court decisions to the contrary were decided later. The court also observed that administrative review of a seizure could not serve as a "pretext" for delay (App. A, *infra*, 11a).

b. Although the court of appeals affirmed the judgment of liability, it remanded for a recomputation of the award of $7,300 in damages (App. A, *infra*, 13a-15a). That award apparently was attributable in part to the rental value of the car during the portion of the 4½-month period that the jury found to constitute an unreasonable delay and in part to respondent's claim of mental anguish or emotional distress resulting from the detention of the car (App. A, *infra*, 13a).[7] The court held that an award of damages for mental anguish or emotional distress could not be sustained because the jury had not been properly instructed on this point and because the court's own review of the record convinced it that "[petitioner's] failure to refer promptly [respondent's] automobile for forfeiture was not intentional or malicious" (*id.* at 15a). Thus, the court concluded, the award of damages must be limited to the amount necessary to compensate respondent for the loss of the use of the car, which might include attorney's fees incurred to recover it and the cost of a rental car in the interim.[8]

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[7] Because the jury returned a general verdict, the court could not determine how much of the damage award was attributable to each element (App. A, *infra*, 13a).

[8] Relying on this Court's decision in *Carlson* v. *Green*, 446 U.S. 14 (1980), the court also rejected petitioner's argument that a cause of action should not be implied under the Fifth

REASONS FOR GRANTING THE PETITION

1. This case presents many of the same issues that are presented in *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, petition for cert. pending, No. 81-1062 (filed Dec. 7, 1981). In that case, the Ninth Circuit ordered the dismissal of a forfeiture action after concluding that the claimant's due process rights were violated by the passage of approximately 18 months between the time of the seizure of the property and the date on which the government filed the forfeiture action. There, as here, the claimant had filed a petition for administrative relief from forfeiture, and related criminal charges were pending during a portion of the period preceding the referral to the United States Attorney. 81-1062 Pet. 19-22 & n.21.[9]

As explained in the petition in *$8,850 in United States Currency* (at 14-19), the issue of the amount of time available to Customs officials, following a seizure of property, for the referral of the case to the United States Attorney is a recurring and important one that has received inconsistent treatment by the courts of appeals. The instant case well illustrates the difficulties and uncertainty occasioned by the courts' ad hoc approach, for it threatens to expose Customs officials to personal damages liability

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Amendment because respondent might have pursued other remedies, such as bringing an action to compel the return of her car, withdrawing her petition for administrative relief, or bringing an action against the United States under the Tucker Act. See App. A, *infra*, 11a-13a.

[9] We have furnished respondent with a copy of the government's petition for a writ of certiorari in *$8,850 in United States Currency*.

whenever a jury determines that the period of time prior to a referral was "unreasonable" in the particular circumstances of any one of the numerous forfeiture matters that may be pending in the District Director's office.[10] Guidance by this Court therefore is required in order to bring some uniformity and certainty to this area of law enforcement.[11]

2. This and other forfeiture-related cases also present the important question whether a due process violation may arise solely from the delay in the referral of the case to the United States Attorney, in view of the availability of adequate post-deprivation process by which the claimant may contest the lawfulness of the government's continued possession of the property or bring about a referral of the case to the United States Attorney. See *Parratt* v. *Taylor*, No. 79-1734 (May 18, 1981).[12] As discussed in the

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[10] As mentioned above (see page 9, *supra*), there were 1,223 seizures of automobiles within the area served by petitioner's office in 1975, and as noted in the petition in *$8,850 in United States Currency* (at 20 n.22), there were 44,063 non-narcotic seizures by the Customs Service in 1980.

[11] This case raises the due process issues in a somewhat different context than does *$8,850 in United States Currency*, which involved the dismissal of a forfeiture proceeding brought by the United States. It is possible that if certiorari is granted in the latter case, the Court's decision could address primarily the question whether dismissal of a forfeiture action is an appropriate remedy for a delay in referral, and therefore might have no need to reach the issue whether a due process violation occurred. This case would present the Court with an occasion to consider the due process issue, and therefore might appropriately be set for argument in tandem with *$8,850 in United States Currency*.

[12] The court of appeals rendered its decision in this case on the same day that *Parratt* v. *Taylor* was decided. The relevance of *Parratt* to this case was presented to the court

petition in *$8,850 in United States Currency* (at 24-25), if a claimant believes that either a seizure or a forfeiture of his property is unwarranted, he may file a motion pursuant to Fed. R. Crim. P. 41(e) for return of improperly seized property, or he may file an equitable action requiring the government either to bring the civil forfeiture action promptly or return the seized property. See *Slocum* v. *Mayberry*, 2 Wheat. (15 U.S.) 1, 9 (1817); *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, 530 F.2d 672, 674-675 (5th Cir. 1976). Similarly, the claimant may withdraw his petition for administrative relief—which itself furnishes an informal process for the determination of ownership interests in seized property, cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-690 (1974); *United States* v. *United States Coin & Currency*, 401 U.S. 715, 721-722 (1971); *Commissioner* v. *Shapiro*, 424 U.S. 614, 630 n.12 (1976)—and thereby bring about a referral of the case to the United States Attorney without the delay occasioned by investigation and consideration of the request for administrative relief.

Particularly where, as the district court found here (see page 9, *supra*), there was probable cause for the initial seizure,[13]—and thereby probable cause to believe that the property was forfeited and belonged to the United States, subject only to title

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of appeals in petitioner's petition for rehearing and suggestion for rehearing en banc, which were denied without comment.

[13] In this case, there had been two separate findings of probable cause to believe a statutory violation had occurred: in connection with the issuance of the warrant to search the house to which respondent had driven Benson, and in the subsequent return of the indictment against the Bensons.

being perfected in the United States in subsequent judicial proceedings, see *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890)—it is entirely fair to conclude that a due process violation has not been established where the claimant has not initiated these other actions available to him. See *Parratt* v. *Taylor*, *supra*, slip op. 15-16.[14]

3. Finally, the court of appeals erred in concluding that petitioner was not entitled to the defense of qualified immunity as a matter of law.

This Court's decisions have "emphasized * * * that, at least in the absence of some showing of malice, an official would not be held liable in damages * * * unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation" (*Butz* v. *Economou*, 438 U.S. 478, 498 (1978)). See also *Procunier* v. *Navarette*, 434 U.S. 555, 562-563 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 321-322 (1975). In this case, the court of appeals explicitly determined after its own independent review of the record that petitioner's failure promptly to refer respondent's case to the United States Attorney "was not intentional or malicious" (App. A, *infra*, 15a).

Moreover, "[w]hether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court" (*Procunier* v. *Navarette*, *supra*, 434 U.S. at 565), there was no "clearly established" constitutional right

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[14] The finding of probable cause also may be viewed as establishing the government's right to maintain possession of the property pending further proceedings, administrative or judicial (cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 120-122 (1975)), and, by furnishing this preliminary protection, diminishing the importance of an immediate commencement of the formal forfeiture proceedings themselves.

to a referral in less than the time that elapsed in this case, especially in view of the pending petition for administrative relief. The two district court cases that the court of appeals cited as holding that the filing of such a petition does not toll the time for referring the matter both were rendered in the Central District of California, not the "local District Court" in Washington. The Ninth Circuit did not decide the issue until it rendered its decision in *Ivers* v. *United States*, *supra*, more than three years *after* the conduct of petitioner at issue here, and the court of appeals in this case acknowledged (App. A, *infra*, 10a) that its *Ivers* decision resolved a conflict on the question among the district courts in the circuit. And, finally, no decision of this Court has afforded guidance in the area, either with respect to the period of time within which forfeiture proceedings must be commenced generally, or the effect of a pending petition for administrative relief or related criminal proceedings on the length of that period. Particularly where the alleged constitutional violation related to necessarily imprecise time requirements (see *United States* v. *Lovasco*, 431 U.S. 783 (1977)), a federal official should not be held liable in damages based on constitutional doctrine that had not yet been clearly elucidated. Accordingly, petitioner was entitled to qualified immunity as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may deem it appropriate to hold the petition in this case pending the disposition of the petition in *$8,850 in United States Currency* and (if certiorari is granted) the disposition of that case on the merits. If the Court denies

the petition in *$8,850 in United States Currency*, it may wish to grant the petition and remand this case for reconsideration in light of *Parratt* v. *Taylor*.[15] Moreover, the Court may wish to consider summary reversal of the judgment below on the ground that petitioner was entitled to qualified immunity as a matter of law.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ANTHONY J. STEINMEYER
KATHERINE S. GRUENHECK
Attorneys

JANUARY 1982

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[15] See *Lehman* v. *Weiss*, No. 80-2159 (Oct. 5, 1981), vacated and remanded for further consideration in light of *Parratt* v. *Taylor*.

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-4130

JULIE LELATH SEGUIN, APPELLEE

v.

DONALD L. EIDE, ET UX., APPELLANT

Argued and Submitted Dec. 11, 1980

Decided May 18, 1981

Rehearing and Rehearing En Banc

Denied Aug. 28, 1981

Appeal from the United States District Court
for the Western District of Washington

Before GOLDBERG,* Senior Judge, KILKENNY, Senior Judge, and BOOCHEVER, Circuit Judge.

BOOCHEVER, Circuit Judge:

This is an appeal from an adverse personal judgment against Donald Eide, a district director of United States Customs. Ms. Seguin brought a *Bivens-*

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* Honorable Irving L. Goldberg, Senior Circuit Judge, Fifth Circuit, sitting by designation.

type action[1] against Eide, alleging that customs agents who seized her automobile violated her fifth amendment due process rights when they failed to refer her case promptly to the United States Attorney for forfeiture proceedings. Eide maintains that: (1) as a matter of law, the period between the time the seizure was reported to him and referral for forfeiture was too short to amount to a due process violation; (2) he is covered by official immunity; (3) no *Bivens*-type action can be maintained because Seguin could have pursued other remedies; and (4) the damage award was excessive. We agree with this latter contention and remand the case for a redetermination of damages, but conclude that Eide is personally liable.

I. FACTS

On February 5, 1975, David Benson, who identified himself as Michael Morrison, presented an air waybill to a customs inspector at the Seattle-Tacoma International Airport. Benson attempted to pick up two packages from South Africa. Ms. Seguin accompanied Benson to the airport in Benson's automobile. She testified that Benson did not feel well

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[1] *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). *Bivens* involved an implied right of action under the fourth amendment. This court has concluded that a private right of action can be implied for taking property without compensation under the fifth amendment. *Weiss* v. *Lehman*, 642 F.2d 265 (9th Cir. 1981); *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1363-65 (9th Cir. 1977). In *States Marine Lines* v. *Schultz*, 498 F.2d 1146 (4th Cir. 1974), the Fourth Circuit concluded that a plaintiff could bring a cause of action against a federal official when his goods had been illegally detained by customs agents. *See* Comment, 29 Emory L.J. 231 (1980).

and did not want to drive alone. The customs inspector became suspicious of Benson and told him that he was not going to release the packages until he had them appraised. Benson gave the inspector Ms. Seguin's number to call when the appraisal was completed. When Benson and Seguin left, the inspector opened the packages and found forty-four South African gold Krugerrands secreted in the frames of two plaques.

Special agent Hightower determined that Krugerrands were merchandise subject to declaration. In consultation with the United States Attorney's office, he arranged a controlled delivery of the packages. On February 7, a freight agent called Benson at Ms. Seguin's number to notify him that the packages could be cleared.

That day Ms. Seguin drove Benson to the airport in her car, a 1974 Dodge Dart. After Benson picked up the plaques, Seguin drove him back to Seattle where she left him and the packages at a house at 416 35th Avenue. About two hours later, customs agents executed a search warrant of the house and arrested Benson and his wife. The Bensons were jointly indicted for smuggling. David Benson was charged with entering merchandise into the United States under a false declaration.

Hightower called Seguin's lawyer on February 12 to tell him that he was considering seizing her car for forfeiture because of its use in smuggling. The next day, Hightower took the car from Seguin's driveway and drove it to the Federal Building. The case was referred to Mr. Eide on February 14, 1975.

In an attempt to get her car back, Ms. Seguin wrote a letter to Eide on February 25. She explained that she was a 73-year-old, partially crippled widow

who needed her car to move musical instruments. She stated that she took Benson to the airport because he was a member of her church and that she frequently did errands of this kind for the church. She said that she did not know anything about the contents of the packages. On March 19, 1975, Eide responded that her application for relief was under consideration.

On May 15, 1975, the district court dismissed the smuggling count against Benson and his wife because the court concluded that Krugerrands were currency, not merchandise. The government voluntarily dismissed the false declaration count against Benson the next day. Eide was informed of these events by Seguin's lawyer on or before May 27. On June 10, the Justice Department advised the United States Attorney's office not to take an appeal from the district court's dismissal of the smuggling count.

Despite the failure of the criminal case against the Bensons, Eide did not release Seguin's car. Instead, on July 3, Customs referred the case to the United States Attorney's office for a judicial forfeiture. The United States Attorney's office declined to bring a forfeiture action. The car was finally released on August 6, 1975, approximately six months after it was seized.

Seguin initially brought her damage action in King County Superior Court against both Hightower [2] and Eide. The government removed the case to federal district court, where a jury ultimately rendered a

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[2] The Bensons also sued agent Hightower for alleged violation of fourth amendment rights. Their case was dismissed on a motion for summary judgment and we affirmed based on Hightower's qualified immunity defense. *Benson* v. *Hightower,* 633 F.2d 869 (9th Cir. 1980).

general verdict in favor of Hightower but against Eide in the amount of $7,300. The theory of Seguin's case against Eide was that he had violated Seguin's due process rights by failing to refer her case to the United States Attorney's office promptly once the car had been seized. After Eide's motion for a new trial was denied, he brought this appeal.

II. THE DUE PROCESS VIOLATION

Title 19 of the United States Code section 1595(a) and cases interpreting that section provide that any type of vehicle may be seized and forfeited if there is probable cause to believe that it was used to facilitate the importation of illegal goods into the United States. The innocence of the owner is not usually a defense. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974).[3]

Once an agent seizes property for forfeiture, he has a duty to report the seizure "immediately" to the appropriate district customs officer. 19 U.S.C. § 1602. After a forfeiture case has been referred to a United States Attorney by a district customs officer, it is the United States Attorney's duty to investigate the facts "immediately," and if necessary to begin legal proceedings "forthwith." 19 U.S.C. § 1604. As to the intervening period of time between reporting a seiz-

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[3] We have noted that in *Calero* there are indications that serious constitutional problems could arise where a claimant can prove that he was uninvolved and unaware of the unlawful activity and not guilty of any negligence which permitted it. *United States* v. *One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976) (defense not applicable on facts); *see also United States* v. *One 1972 Chevrolet Blazer*, 503 F.2d 1386, 1388-90 (9th Cir. 1977); *Wiren* v. *Eide*, 542 F.2d 757, 764 n.9 (9th Cir. 1977).

ure and referral, when a customs director is in possession of an article, the law now provides that he shall "promptly" report the seizure to the United States Attorney. 19 U.S.C. § 1603. The word "promptly" was not added to section 1603 until 1978, three years after the seizure of Seguin's car. There could be little doubt before this amendment, however, that this was the appropriate standard placed upon Eide.

In *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971), the Court considered a seizure of photographs under 19 U.S.C. § 1305(a). That section allows customs agents to seize obscene material that is being imported into the United States. Once a seizure has taken place, the government must bring a forfeiture proceeding in district court. Like section 1603 before the 1978 amendment, section 1305(a) does not provide for any time limit between an initial seizure and institution of judicial proceedings. The Supreme Court concluded, however, that to save the statute from being unconstitutional, only a fourteen-day period might be allowed. *Id.* at 373-74.

There are certainly differences between a case presenting an issue of prior restraint under the first amendment, such as *Thirty-Seven Photographs*, and a case such as this one which presents a question of due process. The implication of the Court's decision, however, is that lengthy and unexplained delays will not be tolerated. *See White* v. *Acree*, 594 F.2d 1385, 1388 (10th Cir. 1979).

In *United States* v. *One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977), we stated:

> From the standpoint of the claimant, the stage in the procedures at which excessive delay oc-

> curs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the confiscated vehicle. Furthermore, if reasonable time limits are not placed upon the application of §§ 1602-1604, a question of the constitutionality of the statutes could be raised.

See also Sarkisian v. *United States*, 472 F.2d 468, 471 (10th Cir.), *cert. denied*, 414 U.S. 976, 94 S.Ct. 291, 38 L.Ed.2d 219 (1973).

The judge instructed the jury that Eide had a duty to either report the forfeiture of Seguin's car to the United States Attorney promptly so that forfeiture proceedings could begin, or to release it. The court further instructed the jury that promptness had to be inferred "in light of all relevant facts and circumstances." This instruction comports with the law.

Eide contends that the court should have ruled as a matter of law that the delay between seizure and referral was not excessive. He maintains that no court has found a due process violation where the delay between a seizure and referral has been as short as four months and nineteen days, the period from February 14, 1975 when the seizure was reported to July 3, 1975.

Several courts have concluded that there was no due process violation where there was a far longer delay between seizure and referral than there was in this case. One similarity among these cases, however, is that administrative investigation before referral of the claim caused the delay.[4] In some cases the courts

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[4] *See White* v. *Acree*, 594 F.2d 1385 (10th Cir. 1979); *United States* v. *One 1973 Buick Riviera Auto.*, 560 F.2d 897 (8th Cir. 1977); *United States* v. *One (1) 1972 Wood, 19*

specifically accepted the position, rejected by this court, that filing an administrative petition can toll the period between seizure and referral. The rule in this circuit is that filing a petition for remission under section 1618 [5] does not excuse the government from referring a case promptly. *Ivers* v. *United States*, 581 F.2d 1362, 1372 (9th Cir. 1978).[6]

There are sufficient facts from which a jury could find that Eide did not act promptly. From Seguin's letter, Eide knew or should have known of the possible hardship. The underlying criminal indictment was dismissed. Although the agents might have legally seized Ms. Seguin's car even though she was innocent *see Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90, 94 S.Ct. 2080, 2094-95, 40 L.Ed.2d 452 (1974), this likelihood increases the importance of an expedited referral particularly since an automo-

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Foot Custom Boat, 501 F.2d 1327 (5th Cir. 1974); *United States* v. *One 1973 Ford LTD*, 409 F.Supp. 741 (D.C. Nev. 1976).

[5] 19 U.S.C. § 1618 provides that penalties may be mitigated if the Secretary of the Treasury finds that the owner was without negligence or intent to violate the law. Ordinarily a decision under § 1618 is not reviewable in the courts. *See, e.g., United States* v. *One 1970 Buick Riviera*, 463 F.2d 1168, 1170 (5th Cir.), *cert. denied*, 409 U.S. 980, 93 S.Ct. 314, 34 L.Ed.2d 244 (1972). Administrative remedies may thus be of some importance to the innocent owner of a seized article.

[6] *Ivers* v. *United States*, 581 F.2d 1362, 1372 (9th Cir. 1978) was decided after this case arose. Therefore, although there may in fact have been a due process violation because Seguin's letter requesting the return of her car did not toll the referral period, it is possible that Eide might have concluded that the petition extended the time available to him before referral was required. The reasonableness of this belief is discussed in consideration of the applicability of official immunity.

bile is a rapidly depreciating asset. *See United States* v. *One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977) (the court held that "because of the fast depreciating nature of an automobile, the Government's claim that no prejudice to the claimant resulted from the untimeliness of the Government's action is clearly without merit"). *Stypmann* v. *City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) ("Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle."

III. OFFICIAL IMMUNITY

Eide next contends that he is protected from suit by official immunity and objects to a jury instruction on the issue.

Executive branch officials are ordinarily accorded only a qualified immunity from *Bivens*-type actions, *Butz* v. *Economou*, 438 U.S. 478, 504-08, 98 S.Ct. 2894, 2909-11, 57 L.Ed.2d 98 (1978). Officials will be liable where they actually know or should know that an action violates someone's constitutional rights. The Supreme Court has concluded that this standard for determining liability requires that the constitutional rule be clearly established at the time the official is responsible for some action. *Procunier* v. *Navarette*, 434 U.S. 555, 98 S.Ct. 855, 5 L.Ed.2d 24 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 214 (1975). "The official cannot be expected to predict the future course of constitutional law . . ." *Procunier*, 434 U.S. at 562, 98 S.Ct. at 859.

Eide argues that he could not possibly have predicted at the time this case arose that filing a petition for remission could not toll the time available to refer the case to the United States Attorney. He notes that before this circuit's decision in *Ivers* v. *United*

States, 581 F.2d 1362 (9th Cir. 1978), the district courts within the Ninth Circuit were split on the tolling effect of an administrative review of a seizure. He also contends that it was Custom's practice to await the outcome of such a review before referring a case.

At the time Eide delayed referral the two district courts in the Ninth Circuit which had addressed the issue concluded that a petition for remission cannot justify a delay in referring a case for forfeiture. *See United States* v. *A Quantity of Gold Jewelry*, 379 F.Supp. 283, 287 (C.D.Cal.1974), *aff'd in part, vacated in part and remanded*, 554 F.2d 1072 (9th Cir. 1977); *United States* v. *One 1971 Opel G. T.*, 360 F. Supp. 638 (C.D.Cal. 1973). On the other hand, in two cases decided after the Seguin case was referred to the United States Attorney, *United States* v. *One (1) 1973 Ford LTD*, 409 F.Supp. 741 (D.Nev.1976) and *United States* v. *One 1964 MG*, 408 F.Supp. 1025, 1028-29 (W.D.Wash.1976), *rev'd on other grounds*, 584 F.2d 889 (9th Cir. 1978), the courts concluded that the filing of a petition for remission could toll the requirement for a prompt referral during the time the government investigated the petition.[7] The court in *Ivers* noted that the issue

> has provoked a bold conflict of rulings among the district courts in this circuit and elsewhere . . . .

581 F.2d at 1370. Since the conflict arose after Eide's inaction, there is slight merit to Eide's argument that he might reasonably have believed that he could delay referring Seguin's case to the United States Attorney while it was under investigation by his office.

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[7] It is difficult to understand how Eide could rely on these opinions because they were not decided until after Seguin's case arose, but they do point to some uncertainty in the law.

In any event, courts that have allowed an administrative review to delay a referral, have also noted that an administrative review cannot serve as a pretext to justify delays. *See One 1964 MG*, 408 F.Supp. at 1029. Therefore, even if Eide had believed that he could delay referring the case to the United States Attorney while his office investigated the case, a reasonable official would have realized that the investigation had to be completed promptly.

The evidence indicates that customs officials, who seemed to be primarily concerned with the case against the Bensons, did little more than write several letters to Seguin's attorney stating that her case was under investigation. From this evidence a jury might conclude that Eide was unreasonable if he believed that this was sufficient action to justify a four and one-half month administrative delay.

Finally the jury instruction to which Eide has objected substantially comports with the law relating to official immunity.[8]

IV. ALTERNATIVE CAUSES OF ACTION

Eide next contends that a *Bivens*-type action should not be allowed because Seguin might have pursued other remedies as an alternative to a *Bivens* action.

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[8] The text of the instruction was as follows:

> If, after considering all the evidence in this case, you find by a preponderance of the evidence that there were reasonable grounds for defendant Eide to believe that it was appropriate for him to defer the reporting of the seizure to the United States Attorney until July 3, 1975, and if you further find that defendant Eide acted in good faith in believing that it was appropriate for him to defer the reporting until that date, then you should find for defendant Eide even though you find that he did not promptly report the seizure to the United States Attorney for the commencement of forfeiture proceedings.

Bivens suggests that where Congress has acted affirmatively to provide an alternative avenue for relief, a *Bivens* action should not be allowed. *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 396-97, 91 S.Ct. 1999, 2004-05, 29 L.Ed.2d 619 (1971). Eide's argument, however, must be reviewed in light of the Supreme Court's recent decision in *Carlson* v. *Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), a case decided after this case was briefed. It is plain from the Court's opinion in *Carlson* that *Bivens* is to be given an expansive reading. In *Carlson* the Court concluded that the availability of a remedy under the Federal Tort Claims Act (FTCA) would not foreclose a *Bivens* action. *Id.* at 23, 100 S.Ct. at 1474. The Court noted that Congress had not indicated that the FTCA was to replace *Bivens*-type actions, and further noted several other features of *Bivens* actions that were unlike actions brought under the FTCA. Among them, *Bivens* would serve a greater deterrent purpose by making officials personally liable, and a plaintiff has a right to a jury under *Bivens*, but not under the FTCA.

In this case Eide has hypothesized that several alternative remedies were available to Seguin. Essentially, the alternatives were: (1) Seguin could have brought an action for the return of her car or withdrawn her administrative petition, or (2) she might have brought an action under the Tucker Act, 28 U.S.C. § 1346(a)(2).

The first possible remedy is plainly an inadequate substitute for a *Bivens* action. Seguin could not have recovered any damages had she abandoned her administrative remedies.

For many of the reasons cited by the Court in *Carlson*, we also conclude that the possibility of a claim

against the United States under the Tucker Act was inadequate to foreclose a *Bivens* action. There is no right to a jury trial under the Tucker Act. 28 U.S.C. § 2402. An action against the United States would not have the same deterrent effect as an action against Eide personally. Furthermore, because Seguin's complaint alleged over $12,000 in damages the district court would not have had jurisdiction to decide the case. 28 U.S.C. § 1346(a)(2).

Seguin therefore could properly base a claim on a constitutional violation.

V. DAMAGES

The jury awarded Seguin $7,300 in damages. Eide contends that the damage award is excessive for two reasons. First, there was no showing of loss of use damages in excess of either $1,360 or $1,738, the cost that Ms. Seguin would have incurred to rent a replacement car according to the testimony. Second, the jury should not have been permitted to award damages for mental anguish or emotional distress.[9]

Because the jury returned a general verdict, it is not possible to determine how much of the award is for Seguin's emotional distress and how much is for actual loss of use of her car.

The general state court rule is that absent bodily injury, damages for emotional distress for wrongful garnishment or other seizures of property are not recoverable unless this is willful or malicious conduct. Annot., 83 A.L.R.3d 598 (1978). Unless there is an increased probability, that because of willful misconduct, there may actually have been emotional dis-

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[9] Eide objected to the submission to the jury of the issue of emotional damages.

tress damages, the rule prevents recovery for easily feigned injuries. Federal courts may look to state law in fashioning a proper damage award for violations of constitutional rights, *see Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 240, 90 S.Ct. 400, 406, 24 L.Ed. 2d 386 (1969), and we believe that the general rule should be utilized in this case.

Seguin has cited a number of cases against state officials arising under 42 U.S.C § 1983 for the proposition that emotional distress damages are available. Although the analogy between a *Bivens* action and a 1983 action is not misplaced, in all of the section 1983 cases cited by Seguin the defendant's conduct was specifically found to be intentional or willful, or such conduct could be readily inferred from the facts.

Proof of intentional or willful misconduct is not a prerequisite for bringing either a § 1983 [10] or *Bivens* action. *Basista* v. *Weir*, 340 F.2d 74, 81 (3d Cir. 1965); *See*, *Weiss* v. *Lehman*, 642 F.2d 265 (9th Cir. 1981). Furthermore, government officials may lose their official immunity whenever they "know or *should* know" they are "acting outside the law." *Butz* v. *Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 98 (1978) (emphasis added). The standard thus encompasses the familiar tort standard of reasonableness. We are satisfied that Seguin introduced sufficient evidence from which it might be inferred that her constitutional right to due process was violated and that Eide should have known that he was acting beyond the permissible bounds of the law. This,

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[10] On March 2, 1981, the Supreme Court heard argument in *Parratt* v. *Taylor*, No. 79-1734. One issue in *Parratt* is whether the conceded negligence of prison officials could justify a § 1983 action.

however, does not necessarily imply that his conduct was willful or malicious.

The jury was not instructed that they had to find Eide's behavior was intentional or malicious before awarding damages for emotional distress. Moreover, our own review of the record convinces us that Eide's failure to refer promptly Seguin's automobile for forfeiture was not intentional or malicious. We hold that damages for emotional distress cannot be awarded.

It is therefore necessary to remand the case for a computation of Seguin's damages from the loss of use of her car. Such damages might include such items as the cost of rental cars and attorney fees reasonably incurred to recover her car.

The judgment of the district court is AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4130

DC# CK 75-718

JULIE LELATH SEGUIN, APPELLEE

v.

DONALD L. EIDE, ET UX., APPELLANT

[Filed Aug. 28, 1981]

Before: GOLDBERG *, Senior Judge, KILKENNY, Senior Judge and BOOCHEVER, Circuit Judge.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

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* Honorable Irving L. Goldberg, Senior Circuit Judge, Fifth Circuit, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C76-182V

JULIE LELATH SEGUIN, PLAINTIFF

vs.

RAYMOND C. HIGHTOWER, and JANE DOE HIGHTOWER, his wife; and DONALD L. EIDE, and JANE DOE EIDE, *his wife*, DEFENDANTS

[Filed Oct. 24, 1978]

VERDICT

We, the Jury, find for the plaintiff and against defendants Eide in the sum of $7,300.

Dated this 24 day of October, 1978.

/s/ Dennis C. Harvey
Foreman

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Civil Action File No. C76-182V

JULIE LELATH SEGUIN

vs.

DONALD L. EIDE, and JANE DOE EIDE

JUDGMENT

This action came on for trial before the Court and a jury, Honorable DONALD S. VOORHEES, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the plaintiff.

It is Ordered and Adjudged

that Judgment be entered against the Defendants, Donald L. Eide and Jane Doe Eide, in the sum of $7,300.00.

Dated at Seattle, Wa. the 24th day of October, 1978.

/s/ R. C. Paris
Deputy Clerk of Court

[Filed Oct. 24, 1978]

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISRICT OF WASHINGTON

No. C76-182V

JULIE LELATH SEGUIN, PLAINTIFFS

vs.

RAYMOND C. HIGHTOWER and JANE DOE HIGHTOWER, his wife, and DONALD L. EIDE and JANE DOE EIDE, his wife, DEFENDANTS

[Filed Jan. 17, 1979]

ORDER ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR NEW TRIAL

Having considered defendant's motion for judgment notwithstanding the verdict or for new trial together with the memoranda and affidavits filed by counsel, the Court now finds and rules as follows:

1. On February 7, 1975 the plaintiff, Julie Lelath Seguin, drove David Benson to the Western Airlines freight terminal at the Seattle-Tacoma International Airport for the purpose of picking up two packages which were being imported into the United States. Some three days prior to this time customs agents in the course of inspecting these packages had discovered forty-four South African Krugerrands concealed in the backing of two wall hangings contained therein. In making a controlled delivery of these hangings to Benson on February 7, 1975, the customs officers hoped to discover the source and intended recipient of the concealed Krugerrands. After Benson obtained delivery of the wall hangings, plain-

tiff transported him and the two hangings to the Benson residence in Seattle, Washington.

2. Later that same day the Benson residence was searched by customs officers pursuant to a search warrant. During that search the wall hangings containing the Krugerrands were found and seized. Benson and his wife, Janice, were arrested and subsequently indicted in a two-count indictment for violation of 18 U.S.C. § 542 and § 545. On May 15, 1975 the Honorable Walter T. McGovern found that the Krugerrands in question were currency rather than merchandise under 18 U.S.C. § 545 and dismissed Count II of the indictment against the Bensons. Count I of the indictment was voluntarily dismissed the following day by the Assistant United States Attorney in charge of the criminal prosecution.

3. On February 13, 1975, six days after the plaintiff had driven David Benson to the airport to pick up the packages defendant Hightower, a special agent of the Customs Service, seized plaintiff's personal vehicle, a 1974 Dodge Dart, pursuant to 10 U.S.C. § 1595a, on the ground that it had been used to transport the Krugerrands. The following day defendant Hightower surrendered custody of plaintiff's vehicle to defendant Eide, District Director of the Customs Service. On February 25, 1975 plaintiff wrote to defendant Eide seeking the return of her vehicle. In her petition for remission plaintiff set forth the following: (1) that she drove David Benson to the airport because he was too sick with the flu to drive himself, (2) that she often gave rides to members of her church, as she did for Benson in this case, as her way of tithing to her church, (3) that she did not know the contents of the packages that Benson was picking up, (4) that she was 73

years old and a widow for 20 years but that she still continued to work as a musician in order to earn a livelihood, (5) that she was partially crippled and needed her car for transportation and (6) that she could not afford to hire taxis in order to get around.

4. Defendant Eide acknowledged receipt of plaintiff's petition by letter dated March 19, 1975. In this letter he advised her that her petition was currently under consideration and that she would be notified when a decision was reached. In subsequent communications defendant Eide was advised by the plaintiff's attorney of the disposition of the related criminal case against the Bensons and of the severe hardship which the plaintiff was suffering as a result of her being deprived of her vehicle.

5. On July 3, 1975 defendant Eide referred the seizure of plaintiff's vehicle to the United States Attorney for the commencement of forfeiture proceedings. By letter dated July 23, 1975, the United States Attorney declined to proceed with forfeiture proceedings and instructed defendant Eide to release plaintiff's vehicle. Pursuant to this instruction defendant Eide released plaintiff's vehicle to her on August 6, 1975.

6. Defendant Eide contends that the delay of four months nineteen days between his receipt of plaintiff's vehicle and his referral of the matter to the United States Attorney for the commencement of forfeiture proceedings was not untimely or unreasonable as a matter of law. Although, as defendant Eide correctly contends, the delay in this case is shorter than the delay in a number of cases where no due process violation had been found, as, for example, *United States* v. *One 1973 Ford LTD.*, 409 F.Supp. 741 (D. Nev. 1976), a determination as to

whether a delay is unreasonable, and thus violative of a claimant's due process rights, is a finding which is to be made in light of all the facts and circumstances of a particular case. See: *United States* v. *One Motor Yacht Named Mercury*, 527 F.2d 1112 (1st Cir. 1975); *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (4th Cir. 1974); *United States* v. *One 1973 Ford LTD., supra.*

7. A number of factors are present in this case most of which have been explicitly recognized in the cases cited by defendant Eide, which make the instant case distinguishable from the cases relied upon by defendant Eide. Among these factors are the following: (1) the plaintiff suffered significant prejudice due to the delay caused by the defendant because (a) the plaintiff was extremely dependent on her vehicle as a means of transportation because of her age and her partially crippled condition, and (b) the vehicle was a wasting asset since its fair market value was decreasing with the passage of time. See: *Ivers* v. *United States*, 581 F.2d 1362 (9th Cir. 1978); *United States* v. *One 1971 Opel GT*, 360 F. Supp. 638 (C.D. Cal. 1973), (2) there was a genuine factual dispute as to whether the vehicle was forfeitable, *United States* v. *One 1973 Ford LTD., supra*, (3) the plaintiff did not consent to any delay in the processing of her administrative petition, *Ivers* v. *United States, supra*, and (4) there were no charges pending against the plaintiff in any related criminal proceeding so that she would not have been prejudiced by the commencement of forfeiture proceedings.

8. In light of these distinguishing factors the contention of defendant Eide that the delay in this case was a matter of law not untimely or unreasonable

is not well taken. There is sufficient evidence in the record to sustain the jury's verdict that in light of all the facts and circumstances of this case the defendant Eide did not act with reasonable promptness in referring this matter to the United States Attorney for the commencement of forfeiture proceedings.

9. Defendant Eide's contention that he is entitled to judgment notwithstanding the verdict based on his qualified immunity is not well taken. In support of his argument that he is entitled to judgment notwithstanding the verdict based on his qualified immunity the defendant Eide contends: (1) that an official cannot be held liable in damages unless the constitutional right he was alleged to have violated was clearly established at the time of the violation. See: *Butz* v. *Economou*, 438 U.S. 478, 57 L.Ed.2d 895 (1978), (2) that the question of whether the filing of an administrative petition excused the submission of a forfeiture to the United States Attorney was an unsettled question of law at the time of his alleged violation of plaintiff's right to due process, and (3) that he is entitled to immunity under *Butz* v. *Economou*, *supra*, as a result. Even if it were assumed that at the time of defendant Eide's retention of plaintiff's car, it was an unsettled question of law as to whether the filing of an administrative petition excused the submission of a forfeiture to the United States Attorney, defendant Eide's contention is still not well taken. While it may have been an unsettled question of law as to whether the filing of an administrative petition excused the referral of a forfeiture to the United States Attorney, it was clear that defendant Eide was required to act "promptly" or "immediately" with respect to the proceeding of the administrative claim and the referral of the matter

to the United States Attorney for action. See, for example, *United States* v. *One 1971 Opel GT*, *supra*. We believe that the jury was properly instructed in this case both with respect to defendant's duty to act "promptly" and with respect to his qualified immunity under *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Shelton* v. *U.S. Customs Service*, 565 F.2d 1140 (9th Cir. 1977). Defendant Eide is not entitled to judgment notwithstanding the verdict based on the rationale of *Procunier* v. *Navarette*, 434 U.S. 555 (1978) and *Butz* v. *Economou*, *supra*.

10. Defendant Eide's contention that he is entitled to judgment notwithstanding the verdict or in the alternative a new trial based on his absolute immunity is not well taken. The fact that defendant Eide had unreviewable discretion under 19 U.S.C. § 1618 to return plaintiff's vehicle to her or to refer the matter to the United States Attorney for the commencement of forfeiture proceedings does not give him absolute immunity with respect to the timeliness of his actions. See *States Marine Lines* v. *Shultz*, *supra*.

11. Defendant Eide's contention that the jury's verdict was excessive and contrary to the law and evidence in the case is not well taken. Viewing the evidence most favorably to the plaintiff and giving her the benefit of all reasonable inferences therefrom, there was in the record suffiicient evidence to support the jury verdict as to damages. Under the Court's instructions the jury was entitled to award damages to plaintiff for the loss by her of the use of her car and in addition for the emotional distress and mental anguish experienced by her during the period of time that her vehicle was unlawfully retained. The damages awarded by the jury, although high, were not

so excessive that they need be set aside and a new trial awarded.

12. Defendant Eide's contention that the question of damages for mental distress was improperly submitted to the jury is not well taken. In an action such as this, brought under the rationale of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), it is appropriate to look to the scope of compensatory damages as set forth in cases under 42 U.S.C. § 1983 to determine whether damages for mental and emotional distress are properly awardable. An examination of this extensive body of law reveals that damages for mental and emotional distress are awardable. See: *Seaton* v. *Sky Realty Co. Inc.*, 491 F.2d 634 (7th Cir. 1974); *Donovan* v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Aumiller* v. *University of Delaware*, 434 F.Supp. 1273 (D.Del. 1977).

Accordingly, the motion of defendant Eide for judgment notwithstanding the verdict or in the alternative for a new trial is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 16 day of January, 1979.

/s/ Donald S. Voorhees
United States District
Judge

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Opposition

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No. 81-1249

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD L. EIDE, et ux.,
Petitioners,

v.

JULIE LELATH SEGUIN,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD W. PIERSON of
THOM, NAVONI, PIERSON,
RYDER & MAJOR
Attorneys for Respondent
3737 Bank of California Center
Seattle, WA 98164
(206) 623-8433

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD L. EIDE, et ux.,
Petitioners,

v.

JULIE LELATH SEGUIN,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIE LELATH SEGUIN hereby responds to the Petition for Writ of Certiorari filed by petitioners for review of the judgment of the United States Court of Appeals for the Ninth Circuit decided May 18, 1981.

STATEMENT OF THE CASE

Respondent accepts the petitioners' statement of the case with respect to the opinions and judgments of the courts below, jurisdiction and the constitutional, statutory and regulatory provisions involved in this case. To present the Court with a complete and accurate statement of the facts involved, respondent feels compelled to make the following statement of facts in addition to those stated by the petitioner.

As noted by the petitioner, on April 2, 1975, respondent's attorney wrote to the petitioner requesting that he exercise his discretion to release respondent's automobile (R. 63-64). Petitioner fails to note that on May 20, 1975, shortly after the indictments against the Bensons were dismissed, counsel for respondent directed yet another letter to petitioner advising him of the dismissal of these charges and again requesting that the vechile be returned (Exhibit 5). No response was ever received to this letter. By June 10, 1975, at the latest, the United States attorney's office in Seattle had been notified by the Solicitor's office in Washington D.C. that dismissal of the indictment against the Bensons would not be appealed (TR. 402).

Ten days later, on June 20, 1975, petitioner finally decided to refer the seizure to the United States attorney's office for forfeiture proceedings (TR. 345). However, the matter was not formally referred to the United States attorney until two weeks later on July 3, 1975 (TR. 346).

In response to the respondent's inquires and requests that her car be released, petitioner Eide notified respondent and her attorney that the matter was under investigation and that no decision would be made regarding disposition of her automobile until the conclusion of the investigation (R. 65) (Exhibit 4). At trial, however, petitioner Eide testified that, despite the fact that he was charged with responsibility for conducting an investigation and despite the fact that his March 19, 1975, and April 16, 1975, letters to the respondent and her attorney indicate that an investigation was ongoing, that he conducted no such investigation during the entire period of time that the vehicle was being held (TR. 3454-3455).

Also, in respondent's initial Feburary 25, 1975, letter and her attorney's letter of April 2, 1975, petitioner was notified that respondent was of an advanced age (73), partially crippled, and very dependant upon her automobile (Exhibits 1, 3).

SUMMARY OF ARGUMENT

Prior to the amendent of 19 USC §1603 in 1978, the case law had consistently held that in forfeiture cases there was a duty to "promptly" or "immediately" refer the case to the United States attorney. There is no judicial clarification of this standard needed to guide the courts. Petitioner's suggestion that the Court may establish some uniformity with respect to whether a delay is "unreasonable" is misplaced since the customs officer's qualified immunity is a question of fact which must necessarily be determined on the basis of facts presented in each case. Liability of an officer is only established in the event that a jury finds that a case was not promptly reported *and* that there were not reasonable grounds for the delay or that the officer acted in bad faith in delaying the referral. No uncertainity exists in this area of the law and certainly no question of precarious liability for an agent was presented under the facts of this case.

The cases are consistent in holding that a party is entitled to prompt action at every stage of a forfeiture proceeding. The facts of this case present no question as to whether the respondent's due process rights were preserved by the filing of an administrative action or the availability of other post deprivation proceedings.

Petitioner was not entitled to the defense of qualified immunity as a matter of law based upon a finding that his action was not intentional or malicious. The defense of qualified immunity was a question of fact to be determined by the jury. In this case the jury was properly instructed that petitioner could only be held liable if he did not have reasonable grounds for believing that it was appropriate to delay reporting respondent's seizure to the United States attorney. The filing of a petition for remission does not, and should not, toll the time within which a case must be referred or the property returned.

ARGUMENT

1. At the time of the seizure of respondent's automobile, the previous case law had consistently held that a customs officer was required to "promptly" or "immediately" refer a forfeiture matter to the United States attorney. *United States v. Thirty-Seven Photographs*, 402 U.S. 365; *Sarkisian v. United States*, 472 F.2d 468 (10th Cir. 1973); *United States v. One 1971 Opel G.T.*, 360 F. Supp. 638 (C.D. Cal. 1973); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974); *United States v. A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D. Cal. 1974); *Boston v. Stephens*, 395 F. Supp. 1000 (S.D. Ohio 1975).

As noted by the court of appeals, at the time of the seizure in this case, the statute merely provided that "it shall be the duty of the appropriate customs officer to report such seizure or violation to the United States attorney for the district in which such violation has occurred." 19 USC § 1603. In 1978 the statute was amended to provide that the customs officer must report such seizures "promptly". This amendent merely codified the previous case law and made this statute consistent with the other statutes affecting forfeiture proceedings.

At the time of the seizure, 19 USC § 1602 required that an agent "immediately" report a seizure to his appropriate district customs officer. The United States attorney was also under a duty to "immediately" investigate the forfeiture action and begin legal proceedings "forthwith" after the matter had been referred to him from a customs officer. 19 USC § 1604.

A customs officer is not under an unreasonable threat of liability for failure to "promptly" report a seizure to the United States attorney since he is also protected by a qualified immunity. Regardless of the period of delay, the agent's liability is limited to situations where he knew or should have known that such a delay would be a violation of due process. In this case, the petitioner's own testimony

supported a finding that any period of delay would have been unreasonable since no investigation was conducted while the automobile was detained.

At trial, petitioner Eide testified that he conducted no investigation during the four-and-one-half months the respondent's automobile was held by his office. This testimony, in light of the fact that petitioner had been made aware that respondent was of an advanced age, partially crippled and especially dependent on her automobile, presented the jury with a strong inference of "unreasonable" detention and bad faith. In addition, petitioner Eide had written to respondent and respondent's attorney indicating that a decision on the seizure of her automobile would be made following his "investigation" (Exhibit 4).

Finally, even after the criminal indictments were dismissed against the Bensons, petitioner Eide continued to delay reporting the seizure of respondent's automobile to the United States attorney. Criminal charges against the Bensons were dismissed on May 15, 1975. There was evidence that at least by June 10, 1975, the United States attorney's office in Seattle was notified by the Solicitor's office in Washington D.C. that the dismissal would not be appealed (TR. 402). In light of these decisions, it was not until July 3, 1975, that petitioner Edie finally referred the forfeiture matter to the United States attorney. During the entire period of delay no investigation was conducted and no decision was made on respondent's request for remission.

The facts of this case present no issue as to whether the "period of time prior to a referral was 'unreasonable'" since there were no facts to justify any delay; the petitioner merely detained respondent's automobile for no express reason without conducting any investigation or making determination on her request for remission.

Whether a referral has been made promptly is necessarily a jury question. The facts of this case do not mitigate otherwise.

2. Petitioner's suggestion that this case presents an important issue whether due process may be violated solely from a delay in the referral of a case to the United States attorney when adequate post deprivation proceedings are available, is merely a feint.

The courts have consistently held that a delay at any stage of the forfeiture proceedings is a violation of due process. *Sarkisian v. United States*, 472 F.2d 468 (10th Cir. 1973); *United States v. One 1974 Ford Pickup*, 564 F.2d 864 (9th Cir. 1977). In the *One 1974 Ford Pickup* case at page 866, the court said:

> From the standpoint of the claimant, the stage in the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is a quick and efficient determination of the property rights in the confiscated vehicle.

Petitioner's suggestion that administrative proceedures in lieu of referral of a case to the United States attorney adequately protects a party's due process rights is incredible in light of the facts of this case.

Petitioner admitted at trial that although a petition for remission was pending with his office and there was ongoing correspondence between his office and the respondent and her attorney, that no investigation was conducted on her case and no decision was made regarding the request for remission during the four-and-one-half months that the case was held in his office. Such action can hardly be regarded as a substitute for immediate referral of the United States attorney for a decision on whether forfeiture proceedings will be pursued or the property released to its owner.

As noted by the court of appeals:

> At the time Eide delayed referral, the two district courts in the Ninth Circuit which had addressed the issue concluded that a petition for remission cannot justify a delay in referring a case for forfeiture.

645 F.2d 804, 810.

The administrative decision on a petition for remission is a non-appealable determination within the discretion of customs officials. This rule is consistent with the statutory scheme which requires that the matter be promptly referred to the United States attorney's office for a juducial determination. In cases such as this where a party may be deprived of property without a prior hearing, due process requires that the party receive a meaningful opportunity to be heard subsequent to the initial taking. *Parratt v. Taylor*, 451 U.S. 527 (1981). The procedures established in 19 USC § 1602-1604 provide this opportunity. The administrative procedures suggested by petitioner are either inapplicable to this case (Fed. R. Crim. P. 41(e)) or inadequate to provide the same protection afforded by prompt referral to the United States attorney.

In *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978) the Ninth Circuit addressed this issue to clarify a disparity between this decisions of various district courts in the circuit which had developed over the preceeding few years. In *Ivers*, the Ninth Circuit clearly established that a petition for remission could not toll the time available within which a case must be referred to the United States attorney for forfeiture proceedings. This holding is consistent with the statutory scheme requiring "immediate" action at every stage of the forfeiture proceedings. If this Court were to reverse *Ivers* and hold that a pending petition for remission may properly delay the referral of a case to the United States attorney, it would, in this case, raise a question as to whether the administrative proceedings were conducted *promptly*. A party is entitled to prompt action at this stage of the

proceedings as well as all others; especially when a wasting asset such an automobile is involved. *Boston v. Stephens*, 395 F. Supp. 1000 (S.D. Ohio 1975). In this case, Seguin was also denied the prompt action she was entitled to on her petition for remission; she was thus denied her right to due process at this stage of the proceedings as well.

No question of federal law on this issue exists in the Ninth Circuit and no question is presented by the facts of this case which has broad consitutional import requiring a determination by this Court.

3. The court of appeals did not err in concluding that petitioner was not entitled to the defense of qualified immunity as a matter of law. The jury in this case was properly instructed that upon finding that petitioner Eide did not promptly report the seizure of respondent's automobile to the U.S. attorney he could not be held liable for such a delay if there were reasonable grounds for him to believe that the delay was appropriate and he acted in good faith.[1]

In addition, the facts of this case do not present circumstances under which the court could consider whether a petition for remission should toll the time within which an agent must refer a case to the United States attorney's office. Under the facts and circumstances which existed in this proceeding, such a holding would establish a precedent under which the filing of such a petition could be a pretext for delay by a customs official.

Petitioner Eide conceded that no actual investigation took place in response to the respondent's request for remission. In fact, a decision on her request was never rendered; her automobile was held without any administrative or judicial proceedings for six months. Under these facts, a decision of the court allowing the filing of a petition for remission to toll the time within which a matter must be referred to the United States attorney would establish fertile ground for due

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[1] *See Seguin v. Eide*, 645 F.2d 804, 810 n.8 for text of instruction.

process violations. A customs officer could retain property for an extended period of time without conducting any investigation, making a fact finding determination, or rendering a decision on the petition. The discretion of the customs officer in ruling on petitions for remission is not adequate to protect a party's right to due process under the Fifth Amendment to the Constitution.

The current regulations are in accord, providing that an administrative proceeding is merged into the prompt forfeiture proceeding when a matter is referred to the United States attorney. *See* 19 C.F.R. 171.2. A party is not required to exhaust the administrative remedies prior to judicial forfeiture proceedings. *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978). In light of the qualified immunity granted to customs officers, their exposure to liability is appropriately limited to only the most grevious abuses of their authority.

CONCLUSION

The Petition for a Writ of Certiorari should be denied. The Ninth Circuit Court of Appeals correctly ruled that petitioner was required to act "promptly" in referring this matter to the United States attorney. Such a determination is necessarily a question which must be determined by the trier of fact, not a court. To protect customs officers from precarious liability under this standard, they are granted a qualified privilege. Their liability is limited to those circumstances where they knew or should have known their delay was violating a party's right to due process. This immunity should not be extended to grant customs officers a license to abuse their authority, denying citizens a right to due process, without liability for their actions. Such would be the result of a reversal in this case.

Petitioner Eide delayed taking appropriate action following the seizure of respondent's automobile through sheer abuse of authority. He took no action on her request for remission although she was often reassured that her request was being

investigated. Even after all accompanying criminal charges were dismissed against the Bensons, petitioner waited over one month to refer this matter to the United States attorney. In light of the overwhelming evidence against a forfeiture action, the United States atorney properly declined to pursue the matter.

To extend the protection now afforded to customs officers would, under the facts existing in this case, be a precedent for blatant abuse of due process rights under color of authority.

DATED this 15th day of April, 1982.

RICHARD W. PIERSON of
THOM, NAVONI, PIERSON,
RYDER & MAJOR
Attorneys for Respondent Seguin

Petitioner's Reply Brief

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No. 81-1249

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD L. EIDE, ET UX., PETITIONERS

v.

JULIE LELATH SEGUIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

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DONALD L. EIDE, ET UX., PETITIONERS

v.

JULIE LELATH SEGUIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

Since the petition for a writ of certiorari was filed in this case, the Court granted review in *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, cert. granted, No. 81-1062 (Mar. 22, 1982). In our view, this factor weighs strongly in favor of granting the instant petition as well.

Both *$8,850 in United States Currency* and the instant case raise important questions regarding application of the Fifth Amendment Due Process Clause to the operations of the Customs Service during the period between the seizure of property for violation

of the customs laws and the subsequent referral of the case to the United States Attorney for commencement of forfeiture proceedings. As we pointed out in our petition in this case (at 14 n.11), however, the due process issue is presented in a somewhat different context here than in *$8,850 in United States Currency*. In the latter case, the court of appeals ordered dismissal of the judicial forfeiture proceedings on the ground that the length of time between the seizure of the property by the Customs Service and the subsequent referral of the case to the United States Attorney violated the claimant's due process rights. The Court might find it unnecessary to determine whether there had been a due process violation as a result of the passage of time prior to commencement of forfeiture proceedings, because it could conclude that, in any event, dismissal of the forfeiture proceedings is an inappropriate sanction for such a violation in the absence of a showing that the claimant suffered any prejudice as a result of the delay. See 81-1062 Pet. 22-25. Cf. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981); *United States* v. *Marion*, 404 U.S. 307, 325-326 (1971). Such a disposition would, however, leave the lower courts and the Customs Service without any guidance on the underlying issue of the application of the Due Process Clause in the forfeiture setting.

This uncertainty would continue to expose Customs officials, such as petitioner herein, to personal damages liability whenever a jury might determine that the time taken to refer a case to the United States Attorney for commencement of forfeiture proceedings was "unreasonable" in the circumstances of a particular case. Respondent concedes as much. She asserts that "[w]hether a referral has been made

promptly is necessarily a jury question" (Br. in Opp. 5), based on such varying factors as the claimant's age, physical condition, and personal need for the property seized (*id.* at 2, 5) and the measures pursued by the Customs officer prior to forfeiture (*id.* at 4-5, 8). The Due Process Clause is not, in our view, a vehicle for such ad hoc second-guessing by courts and juries of the operations of an office having responsibility for more than a thousand seizures annually (see Pet. 9).

Because this case would afford an opportunity for the Court to consider the underlying due process issue that might not be reached in *$8,850 in United States Currency* and because it arises in the somewhat different context of a personal damages action against a Customs official, the Court's full consideration of the due process issue raised in *$8,850 in United States Currency* and the remedies available for such a violation would be assisted by granting review in this case as well.

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the case should be set for argument together with *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, No. 81-1062.

REX E. LEE
Solicitor General

MAY 1982

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